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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DEANDRE PASCHAL, Defendant and Appellant.	2d Crim. No. B213495 (Super. Ct. No. 334370) (Los Angeles County)

Deandre Paschal appeals his conviction, by jury, of attempted second degree robbery, a felony (Pen. Code, § 211, 664)[1], and disobeying a court order, a misdemeanor. (§166, subd. (a)(4).) The jury further found that appellant committed the crime for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(B).) After appellant waived jury trial on the allegations, the trial court found that he had one "five year" prior felony conviction (§ 667, subd. (a)(1)), and one prior "strike" conviction. (§ 1170.12, subdivisions (a)-(d); 667, subd. (b)-(i).) It sentenced appellant to a total term in state prison of 14 years.

Appellant contends that there is no substantial evidence to support the gang enhancement or his conviction of attempted robbery. He further contends the trial court erred when it failed to bifurcate the gang evidence, when it admitted the victim's

[1] All statutory references are to the Penal Code unless otherwise stated.

preliminary hearing testimony at trial, when it calculated the term for attempted robbery and when it failed to strike appellant's prior conviction. We affirm.

Facts

At about 6 p.m. on New Years' Eve 2007, Richard Odiase was walking on Stevely Street near Coliseum Street in the Baldwin Village neighborhood of Los Angeles. Appellant, who was standing on the sidewalk, "was kind of beckoning [Odiase] to come over[,]" as Odiase walked by. Odiase also noticed another young man, Melvin Hayes, standing on the other side of the street. Hayes and appellant seemed to be together. Appellant started to follow Odiase down the street, increasing his pace as Odiase sped up to avoid him. The area was growing dark, so Odiase was walking toward a more well lit area. He eventually moved into the middle of the street, hoping to attract attention. Odiase was wearing a backpack and he was trying to take it off and move it to his front, to avoid being caught by appellant. Appellant ran into the street after Odiase. Hayes followed them on the sidewalk. As the men rushed down the street, appellant was calling to Odiase, telling him to "come here. Give me your shit," and waiving at him. Odiase thought "They wanted me to come close enough, I think, so that they can grab something from me."

Just then, an LAPD patrol car drove up behind the two men. Officer James Quinata, the driver, and Officer Jonathan Roman, the passenger, noticed that Odiase was running in the street holding his backpack up around his shoulders. He was looking at appellant behind him and yelling; he seemed to be using his backpack to shield himself from appellant. Appellant was following behind Odiase, with his arms and hands outstretched, as if he was reaching for Odiase. Quinata then noticed Hayes, "walking around to the other side of Mr. Odiase." Appellant and Odiase were only a few feet apart when Officer Quinata stopped the patrol car. Quinata spoke with Odiase while Officer Roman contacted appellant.

Officer Quinata thought that Odiase seemed, "very, very afraid. He was breathing heavily, shaking." Odiase told Quinata that appellant said, "come here," and "give me your shit." In his preliminary hearing testimony, Odiase denied that appellant

demanded his property. He admitted, however, that he told the police officers he felt he was being harassed by appellant.

Officers Quinata and Roman had both had prior contacts with appellant. He previously told both officers that he is a member of the Black P Stone, a street gang whose "territory" was in the Baldwin Village neighborhood. Appellant has a gang nickname, "Scooby." He also has Black P Stone gang tattoos and was wearing red, the gang's emblematic color, when the attempted robbery occurred.

Officer Roman testified as both a witness to the incident and an expert on street gangs. He testified that when he and Quinata noticed Odiase and appellant, they were behind the two men, traveling toward them on Stevely Street. Appellant was running toward a man, reaching his hands out as if to grab or hit the man. It appeared to Roman that appellant was attempting to take the other man's backpack. The two men were about three feet apart and about five feet from the patrol car when Officer Quinata stopped the car. After he arrested appellant, Officer Roman asked nearby pedestrians whether they had seen anything. None of them would provide any information concerning the crime.

In his capacity as an expert witness, Officer Roman testified that Baldwin Village is sometimes referred to as "the Jungle," and the gang active in that neighborhood is called Black P Stone. Officer Roman explained, "Several community members commonly say they are afraid to wear red. They have said they see groups of young teens wearing red and they are scared to walk down the street. They would come forward saying they saw a crime occur, but they are afraid to tell what happened due to the [backlash] from the gang."

Officer Roman has had at least 10 contacts with appellant over the previous two or three years. He opined that appellant is a member of Black P Stone because appellant admitted being a member, wore gang tattoos and the color red, had a gang nickname and hung out in Baldwin Village, which is the gang's home. Every time Roman had contact with appellant, appellant was by himself rather than with other gang members. Roman testified that, in his opinion,

a Black P Stone gang member might commit an attempted robbery with another person who was not also a gang member.

Officer Roman was of the opinion that appellant attempted to rob Odiase to benefit Black P Stone, at the direction of the gang or in association with the gang. He based this opinion on the facts that appellant was known in the neighborhood as an active gang member, he was wearing a red striped shirt and standing on his usual corner, and he committed the crime in the middle of a busy street at a time when several pedestrians were out to witness it. According to Officer Roman: "The community looks upon this as intimidation . . . . There's several people around. Him being a gang member, he can walk up to someone and take their property without fearing the law, without fearing maybe witnesses, without fearing any victims will come forward. [¶] In my opinion, he has a stronghold over the community. They all do. And they feel that they can do what they want without any repercussion."

Discussion

Criminal Street Gang Enhancement

The jury found that appellant committed the attempted robbery, "for the benefit of, at the direction of, or in association with [a] criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) Appellant contends the finding is not supported by substantial evidence. We are not persuaded.

" 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must

accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314; see also *People v. Boyer* (2006) 38 Cal.4th 412, 479-480.)

"It is well settled that a trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation." (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196.) The expert's opinion must, however, "root itself in facts shown by the evidence[,]" or be based on other reliable information "reasonably relied upon by experts in that particular field . . . ." (*Id.* at p. 1197.) An expert opinion that does "nothing more than inform the jury how [the expert] believe[s] the case should be decided[,]" cannot constitute substantial evidence to support a finding that a crime was committed for the benefit of a criminal street gang. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658, *People v. Ramon* (2009) 175 Cal.App.4th 843, 851.)

In *Killebrew*, for example, the only evidence that the defendant had the specific intent to benefit a gang was expert testimony that, "when one gang member possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*People v. Killebrew*, *supra*, 103 Cal.App. 4th at p. 652, fn. omitted.) The Court of Appeal concluded this testimony did not constitute substantial evidence in support of a gang enhancement because the expert "did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id.* at p. 658.)

Similarly, in *In re Frank S., supra,* 141 C al.App.4th 1192, the gang expert testified that a gang member possessed a knife to protect himself. She also testified that he "would use the knife for protection from rival gang members and to assault rival gangs. When asked how the minor's possession of the knife benefited the [gang], she responded it helps provide them protection should they be assaulted." (*Id.* at pp. 1195-1196.) The expert did not relate her general opinion concerning gang members' intent in possessing weapons to the facts of the case at issue nor was there other evidence "that the minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Id.* at p. 1199.) As a result, the Court of Appeal

concluded that the expert "simply informed the judge of her belief of the minor's intent with possession of the knife, an issue reserved to the tirer of fact." (*Id.* at p. 1199.) Her testimony did not constitute substantial evidence to support the gang enhancement. (*Id.*)

Here, by contrast, the expert witness was also an eye witness;. His opinion was based on both his observation of the crime and his experience working in the neighborhood on crimes involving members of Black P Stone. Officer Roman based his opinion that appellant is a member of Black P Stone on the facts that appellant had previously admitted his membership in the gang to Roman, used the gang nickname of "Scooby," hung out in a neighborhood claimed by Black P Stone as its territory, had tattoos referring to the gang, and frequently wore the gang's color, red. He opined that the crime would benefit Black P Stone because it would intimidate other residents of the neighborhood. Roman based that opinion on the incident he observed: appellant chased Odiase down the middle of a busy street, on a holiday evening, in full view of many neighborhood residents, unconcerned that any of them would report his crime. According to Officer Roman, these facts show that Black P Stone has successfully intimidated the neighborhood. The robbery brazenly attempted by appellant would only add to that intimidation.

Unlike the gang experts at issue in *People v. Killbrew, supra,* 103 Cal.App.4th 644, or *In re Frank S., supra,* 141 Cal.App.4th 1192, Officer Roman did not base his opinion on a hypothetical unrelated to the crime at issue, or on his preference for how the case should be decided. Instead, he based his expert opinion on the facts he observed and on his experience with both the neighborhood and with appellant. His testimony constitutes substantial evidence in support of the gang enhancement.

Attempted Robbery

Robbery is the "felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Attempted robbery requires proof of "a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission." (*People v. Medina* (2007) 41 Cal.4th 685, 694.)

Appellant contends there is no substantial evidence that he had the specific intent to take Odiase's backpack because there is no evidence that he ever touched it or got any closer than several feet away from Odiase. We disagree. Odiase testified that he felt harassed by appellant and that he ran into the middle of the street because he was afraid. He believed appellant was trying to rob him. Officers Roman and Quinata corroborated that account. They testified that they saw appellant chasing Odiase down the middle of the street while reaching out to grab Odiase's backpack. Immediately after the incident, Odiase told Officer Quinata that appellant said, "Come here. Give me your shit." Quinata thought Odiase seemed "very, very afraid. He was breathing heavily, shaking." He told Officer Quinata that appellant tried to take his backpack. This evidence is sufficient to permit a reasonable jury to find beyond a reasonable doubt that appellant attempted to take Odiase's backpack by means of force or fear. (§ 211; *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

Bifurcation of Gang Evidence

Appellant contends the trial court erred when it refused to bifurcate the trial of the attempted robbery charge from the trial on the gang enhancement. There was no abuse of discretion.

A trial court has broad discretion in deciding whether to bifurcate the trial of gang enhancement allegation from that of the charged offense. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1050.) "[A]s a general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative . . . . Nonetheless, even if the evidence is found to be relevant, the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-224.) As the Supreme Court noted in *Hernandez, supra,* bifurcation may be necessary where the predicate offenses offered to establish a pattern of criminal gang activity (§ 186.22, subd. (e)), are unduly prejudicial or where other evidence relating to gang membership or activity is so inflammatory and "of so little

relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) Where evidence supporting the gang enhancement is, however, admissible to prove some fact relevant to the charged offense, "any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Id.* at pp. 1049-1050.)

Evidence of gang membership may, for example, be relevant to help prove motive or intent. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) "The People are entitled to 'introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.' (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 [28 Cal.Rptr.2d 758].) '[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.' (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85 [81 Cal.Rptr. 386] . . . .)" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

Here, the trial court declined to bifurcate the trial because it found that evidence relevant to the gang enhancement was also relevant to prove appellant's motive and intent. This finding was not an abuse of discretion. As Officer Roman testified, appellant's motive for attempting to rob Odiase on a busy public street, in full view of multiple potential witnesses was to demonstrate his (and the gang's) control over the area and to strengthen that control by intimidating other neighborhood residents. Evidence of his membership in the gang and of its criminal activities was relevant to establish that motive.

Nor can we agree that the gang enhancement evidence was unfairly prejudicial to appellant. Officer Roman identified the predicate offenses briefly and without embellishment; none of them were particularly disturbing or inflammatory. Moreover, the trial court instructed the jury, in terms of CALCRIM No. 1403, to consider evidence of gang activity only for the limited purposes of deciding whether appellant acted with the "intent, purpose and knowledge that are required to prove the gang-related enhancement charged;" deciding whether appellant had a motive to commit attempted

robbery, evaluating witness credibility, and weighing the testimony of the expert witness. The jury is presumed to have followed this instruction. (*People v. Hinton* (2006) 37 Cal.4th 839, 871.) There was no abuse of discretion.

Victim's Preliminary Hearing Testimony

Odiase could not be located to testify at appellant's trial. The trial court found him unavailable and admitted into evidence the transcript of Odiase's testimony at appellant's preliminary hearing. The People also stipulated that Odiase had a prior felony conviction for passing a fictitious check. (§ 470.) Although appellant cross-examined Odiase at the preliminary hearing, he was unaware of the prior conviction or of the fact that Odiase lived in a group home when the crime occurred. Appellant now contends use of the preliminary hearing transcript violated his confrontation and cross-examination rights under the Sixth Amendment to the federal Constitution because he was not able to question or impeach Odiase on those issues. There was no error.

Both the federal and state Constitutions guarantee a criminal defendant the right to confront and cross-examine the witnesses against him or her. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Wilson* (2005) 36 Cal.4th 309, 340.) The right is not absolute. Federal law recognizes an exception to the Sixth Amendment right, "where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant." (*People v. Carter* (2005) 36 Cal.4th 1114, 1172, citing *Crawford v. Washington* (2004) 541 U.S. 36, 59.)

California permits the use of prior testimony under similar circumstances. Evidence Code section 1291, subdivision (a)(2) provides that prior testimony may be used where the witness is unavailable and "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

As our Supreme Court has recognized, admission of an unavailable witness' preliminary hearing testimony does not violate the defendant's confrontation rights "not

because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of confrontation at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution." (*People v. Zapien* (1993) 4 Cal.4th 929, 975; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 850.)

Appellant did not have the opportunity to impeach Odiase with his prior felony conviction or question him about the group home in which he resided. But neither circumstance deprived him of his right to confront and cross-examine the witness. The jury was advised of Odiase's prior conviction and could assess his credibility in light of that fact. Although the jury never learned why Odiase lived in a group home, that omission was harmless beyond a reasonable doubt given the corroborating eye witness testimony of Officers Roman and Quinata. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.)

Sentencing Issues

The trial court sentenced appellant to "the midterm of two years for . . . the violation of Penal Code section 664 slash 211, attempted robbery." That term was then doubled to four years, based on appellant's prior "strike" conviction. Appellant contends the matter must be remanded for resentencing because the trial court failed to halve the sentence, from two years to one, as required by section 664. There was no error. The midterm sentence for attempted second degree robbery is two years. (§§ 18, 213, subd (b).)

Appellant further contends the trial court erred at sentencing when it refused to strike his prior "strike." The trial court denied the request in light of appellant's lengthy criminal history and the violent nature of the current offense. Appellant contends the trial court abused its discretion because his "strike" prior occurred in a juvenile proceeding at which he had no right to a trial by jury. There was no abuse. As our Supreme Court recently held, "the absence of a constitutional or statutory right to a jury trial under the juvenile law does not . . . preclude the use of a prior juvenile

adjudication of criminal misconduct to enhance [under the Three Strikes law] the maximum sentence for a subsequent adult felony offense by the same person." (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1028.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

C. H. Rehm, Judge

Superior Court County of Los Angeles

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